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The Legacy Of *Twyne's Case*

By Daniel Seligman

We know the facts only from court records. One day, a sheriff showed up on the property of a farmer name Pierce. The sheriff had a mission: he had a writ of execution (a court order) that gave him the right to take Pierce's sheep to satisfy a debt that Pierce owed to someone called "C."[1]

And that is when the trouble started.

Pierce insisted that he didn't have the sheep anymore. They now belonged to Twyne, to whom Pierce also owed money. Yes, Pierce's mark was on the sheep and he had recently sheared some of them and even sold others. From the records we can infer that Pierce and Twyne were neighbors and perhaps friends, and that Pierce didn't mind repaying Twyne, but he objected to paying anything (sheep or money) to C.

Pierce had apparently heard in advance of the sheriff's visit and had given everything he owned – his sheep, clothes and other personal possessions – by deed to Twyne.[2] As a result, there was nothing for the sheriff to recover. All of Pierce's property was beyond the sheriff's reach, thus depriving C of any repayment.

What happened next is somewhat unclear but Twyne and his friends (perhaps Pierce) physically resisted the sheriff "with force."

Getting in an altercation with the sheriff – then or now – is not a good idea, nor was the court impressed with Pierce's supposed "gift" of his possessions to Twyne to evade the sheriff's writ. "Fraud and deceit abound in these days more than in former times," the court said as it analyzed the suspicious deed under a statute designed to curb fraudulent conveyances. The panel of three judges invalidated Pierce's deed because it had "the signs and marks of fraud."[3]

For receivers or trustees who practice in the modern day world of insolvency, the language of the opinion should sound familiar as it described Pierce's clever (but ultimately unsuccessful) attempt to evade C's claim and obstruct the sheriff's recovery. But the opinion in *Twyne's Case* was decided in 1601 by the Star Chamber in England, and its language is familiar because it has served as the bedrock of insolvency law for 400 years.

Twyne's Case is the first recorded decision in English jurisprudence that articulated the elements of fraudulent transfers, which are still an essential part of the U.S. Bankruptcy Code and the Uniform Fraudulent Transfer Act, adopted by most states in the United States. Similar principles are also part of insolvency law in other countries around the world, from Australia to Switzerland.

According to the Star Chamber opinion, Twyne (and presumably Pierce) lived in Hampshire in southern England. Pierce owed £400 to Twyne and £200 to C. The sheriff who showed up that day on Pierce's property was the Sheriff of Southampton, who sought to obtain

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Pierce's assets on C's behalf after C had obtained a judgment against Pierce.[4]

There were six indicia – "signs and marks of fraud" – that led the court to invalidate the deed by which Pierce gave his assets to Twyne:

- First, the "gift" was general, and included Pierce's clothes "and anything of necessity."
- Second, Pierce remained in possession and used the items he had "given" to Twyne, as if they were still his own.
- Third, the deed was made in secret and was not recorded.
- Fourth, the deed was executed after the writ was issued.
- Fifth, the deed attempted to create a "trust" between Pierce and Twyne, which (in this instance) was a pretense, a "cover for fraud."
- Sixth, the deed was not made for full consideration (value). Although the deed said it was made "honestly, truly and *bona fide*," the court found this was not the case because the intent of the transfer was to defeat and defraud C.

The court analyzed Pierce's deed under the Fraudulent Conveyances Act of 1571 (also known as the Statute of 13 Elizabeth), which sought to invalidate gifts or transfers with "intent to delay, hinder or defraud creditors" and avoid the collection of debts.[5]

Prior to the act, England had numerous sanctuaries that were beyond the reach of writs. Debtors could give or sell their property at a discount to family or friends, move to a sanctuary (such as a church or even certain precincts) and then wait out their creditors as they exhausted efforts to collect.[6] The statute was designed to prevent that from happening. *Twyne's Case* was the first recorded case interpreting the Fraudulent Conveyances Act. The Star Chamber court made history when it convicted Twyne of fraud "and he and all the others of a riot."[7]

We don't know what happened to Twyne though punishment in those days was often severe. The Star Chamber court, which met in a room with gold stars on the ceiling in the Palace of Westminster, was established in the late 15th century to ensure the fair enforcement of laws against politically and socially prominent individuals. By the early 17th century, however, the court had become known for its arbitrary proceedings, and the very name, "a star chamber proceeding," is still used today to evoke heavy-handed interrogations. The court was abolished in 1640, and the historical abuses of the Star Chamber were a motivating factor behind the protections against self-incrimination adopted in the U.S. Constitution.[8]

Despite the discredited procedures of the Star Chamber, the ruling in *Twyne's Case* and the court's methodical and detailed analysis of fraudulent conveyances live on.[9] In a 1994 decision, the U.S. Supreme Court cited *Twyne's Case*, noting that American bankruptcy law has incorporated a fraudulent transfer provision to curb abuses and that courts have developed a doctrine of "badges of fraud" that rely on similar "signs" of fraud cited in *Twyne's Case*.[10] Federal cases involving receiverships occasionally cite *Twyne's Case*, too.[11]

The adoption of *Twyne's Case* was not smooth, however, and its incorporation in American jurisprudence raised questions about the role of states and the federal government in curbing fraudulent transactions. Although the U.S. Constitution gave Congress the authority to enact "uniform laws on the subject of bankruptcies,"[12] the first federal Bankruptcy Act was passed in 1800, eleven years after the ratification of the Constitution, and Congress repealed the statute only three years later.[13] The short-lived act closely resembled English law and allowed only creditors to initiate a bankruptcy proceeding.[14] For most of the 19th century, there was no federal bankruptcy law. Subsequent statutes were in existence for two years between 1841 and 1843 and then for 11 years between 1867 and 1878. Finally, in 1898, Congress passed a new Bankruptcy Act that "marked the beginning of the era of permanent federal bankruptcy legislation."[15]

States filled that vacuum by attempting to define and enforce fraudulent transactions. In New York, for example, the state legislature in 1829 passed a fraudulent conveyance statute based largely on the 1571 Fraudulent Conveyances Act. An early case described the reach of the law this way: "[e]very sale or other transfer of goods made with intent to defraud creditors, though valid between the parties to the transaction, is utterly void as to the creditors."[16]

By the mid-1920s, many states, including New York, had adopted the Uniform Fraudulent Conveyance Act ("UFCA"), which was based on a model statute created by the National Conference of Commissioners on Uniform State Laws.[17]

Starting in the mid-1980s, most states updated and clarified their fraudulent transfer statutes when they enacted the model Uniform Fraudulent Transfer Act, which replaced the conveyance act in all but a handful of jurisdictions.[18] The UFTA identifies 11 separate "badges of fraud," some or all of which may be present in individual cases.[19]

The current Bankruptcy Code – the last major amendments occurred in 2005 – creates two types of fraudulent transfers under Section 548. The code distinguishes between "actual fraud" and "constructive fraud." To prove "actual fraud," the trustee or creditor has to show intent.[20] To prove "constructive fraud" (sometimes called implied fraud), the trustee or creditor need not show intent but must focus instead on whether the debtor received less than "reasonably equivalent value" as part of the transfer. In other words, constructive fraud involves an analysis of the underlying economics of the transaction, including whether the debtor was insolvent at the time or became insolvent as a result of the transaction.[21] The code also creates a number of affirmative defenses that a recipient of the transfer can assert.[22]

Although Section 548 allows a trustee or creditor to pursue fraudulent transactions two years before the filing of bankruptcy, Section 544 of the Code allows trustees to exercise what are commonly called "strong arm powers" and assert claims under state law.[23] Because many states have a four-year "look back period" for fraudulent transfers, the trustee can seek to avoid transactions that predate the filing of bankruptcy by an additional two years.[24]

Not surprisingly, there has been an enormous amount of litigation in federal and state courts that interprets the elements of fraudulent transactions under the Bankruptcy Code or the state UFTAs. Case law has now applied the "badges of fraud" to highly technical and convoluted circumstances, including options, real estate trusts, leveraged buyouts and other complex financial transactions.

As for modern-day allegations of fraud in agriculture insolvencies, they often sound similar to the scheme hatched by Pierce and Twyne more than 400 years ago. And a few of these cases even involve, as *Twyne's Case* did, criminal consequences for the blatant concealment of assets.

Consider, for example, the strange case of Vern Over, a Pennsylvania farmer in the mid-1990s who wanted to hide assets from his wife during a bitter divorce. To do so, he filed for bankruptcy where he listed virtually no assets.[25] When the Chapter 7 trustee showed up one day to take inventory of the livestock and equipment on the 300-acre farm, he found nothing. It was all gone.

Unlike the facts in *Twyne's Case* – where Pierce, the debtor, asserted he had given everything he owned to Twyne – Over had a different explanation. He said he was living out of his truck and was so distraught about losing his farm that he just couldn't remember what happened to his dairy herd or his tractors, mowers and other equipment. "Selective amnesia," is how prosecutors described his memory to the *Pittsburg Post-Gazette* newspaper.[26] Nonetheless, the bankruptcy court discharged him of his debts.[27]

In 2001, seven years after he filed for bankruptcy, Over was indicted for bankruptcy fraud and for concealing $229,000 of assets from creditors, including his wife.[28] But the imaginative farmer soon reached a plea agreement under which he was required to divulge what happened to the cows and farm equipment. In a meeting with federal agents, a tearful Over "confessed" that he sold the cows to a neighbor, now deceased, for $150,000 in cash, which was delivered in "stacks of $100 bills" to his barn.[29]

Federal agents doubted this story and investigated further. The neighbor's widow, living in a nursing home, said the story was bogus. The agents eventually learned that some of Over's "debts" listed on his bankruptcy petition were apparently concocted to make him look poor and thus deflect his wife's attempts to recover money. Several "creditors," when contacted by federal agents, acknowledged that Over owed them no money.[30]

The federal agents also identified the farmers who bought Over's cows. But they did not face harsh legal consequences, as Twyne did in 17th century England. Instead, prosecutors, armed with new information, asked the court to delay sentencing. In public statements, Over's lawyer tried to make the best of the situation by insisting that Over's crimes didn't harm anybody. Over didn't want to name the people who bought his cows, the lawyer said, nor did Over want to identify those who submitted false bankruptcy claims because he didn't want them to get in trouble. "He was trying to protect people," the lawyer explained to the *Post-Gazette*.[31] As in *Twyne's Case*, the excuses did not work. Over eventually pleaded guilty to the charges. The *Post-Gazette* headline read, "Farmer used cows to milk his creditors, feds charge."[32] In 2003, a federal district court sentenced him to 21 months in jail and ordered him to pay $229,000 in restitution.[33]

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ENDNOTES

[1] *Twyne's Case* (1601), 3 Coke 80b, 76 Eng. Rep. 809.

[2] According to the record of the court decision, the "general deed of gift" included all of Pierce's "goods and chattels real and personal." A personal chattel is any moveable item, including furniture and animals. Real chattel refers to an interest in property (such as a lease) that is less than a "freehold" (free and clear) interest.

[3] There are three contemporary versions of the case. The first (and most often cited) was written by Sir Edward Coke, who served as the Queen's Attorney General in the case. U.S. courts almost always cite Coke's version for the facts in the case. But there is a second version, written by Sir Francis Moore, and a third version by John Hawarde. For an analysis of each version, see Constantin Willems, *Coke, Collusion and Conveyances: Unearthing the Roots of Twyne's Case*, The Journal of Legal History, Vol. 36, No. 2 (2015) ("Willems"), pages 129-151. Another scholar, Charles Ross, argues that Pierce (the name is spelled Pearce in his analysis) actually gave the sheep to his brother and that Twyne was an unwitting participant in the scheme which involved multiple debtors and ancillary transactions. See, Ross, *Elizabethan Literature and the Law of Fraudulent Conveyance: Sidney, Spenser, and Shakespeare* (Taylor and Francis 2003). All three versions agree that the Court of the Star Chamber invalidated the transaction because of the general nature of the "gift," the effort by Pierce to either keep possession of sheep and/or to antedate the deed (after the writ), and his efforts to keep the transaction secret. Willems at page 135.

[4] The decision, as recorded in Coke's Report, states that C had obtained a judgment against Pierce "and had a *fieri facias* [a writ of execution after judgment] directed to the Sheriff of Southampton" for him to enforce.

[5] 13 Eliz., ch.5 (1571). That language is with us to day. The U.S. Bankruptcy Code allows a trustee or creditor to "avoid" (reverse) a fraudulent transfer made with actual intent to "hinder, delay or defraud a creditor." The order of the verbs is different – in the Statute of Elizabeth, it was "delay, hinder or defraud" – but the principle remains the same.

[6] https://en.wikipedia.org/wiki/Fraudulent_Conveyances_Act_1571 See, also, Douglas G. Baird and Thomas H. Jackson, *Fraudulent Conveyance Law and Its Proper Domain,* 38 Vanderbilt Law Review 829 (1985).

[7] The judges were Sir Thomas Egerton (Lord Keeper of the Seal), Chief Justice Sir John Popham and Sir Edmund Anderson, Chief Justice of the Common Pleas.

[8] https://en.wikipedia.org/wiki/Star_Chamber

[9] Stephen P. Harbeck, *Twyne's Case retold: still good law four hundred years later*, 4 Mountbatten Journal of Legal Studies 65 (December 2000) ("Harbeck").

[10] *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994).

[11] See, for example, *In re Colandrea*, 17 B.R. 568 (Bankr. D. Md. 1982) and *In re Black & White Cattle Co.*, 30 B.R. 508 (9th Cir. Bankr. App. 1983). See, also, Harbeck, pages 67-69.

[12] U.S. CONST. art I, § 8, cl. 4.

[13] Act of Apr. 4, 1800, ch. 19, 2 Stat 19 (repealed 1803). For background information, see Charles Jordan Tabb, *The History of the Bankruptcy Law in the United States*, 3 Am. Bankr. Inst. L. Rev. 5 (1995) ("Taab").

[14] Taab, pages 14-15.

[15] Taab, pages 13-14 and 23-24.

[16] *Eberhard v. Marcu*, 530 F.3d 122, 129-130 (2d Cir. 2008).

[17] The Uniform Fraudulent Conveyance Act was proposed by the National Conference of Commissioners on Uniform State Laws in 1918 to codify and bring uniformity to the common law of fraudulent conveyance. The conference is known now as the Uniform Law Commission, www.uniformlaws.org.

[18] Forty-three states and the District of Columbia have adopted the UFTA. Only two states – New York and Maryland – still rely on the UFCA. Five states – Louisiana, Kentucky, Virginia, South Carolina and Alaska – have not adopted a statute and follow the common law of fraudulent transfers.

[19] The elements in the typical state UFTA statute include: 1) the transfer was to an insider; 2) the debtor retained possess or control of the property after the transfer; 3) the transfer was not disclosed; 4) the transfer was made after the debtor was sued (or threatened with a lawsuit); 5) the transfer was for all or substantially all of the debtors' assets; 6) the value of the assets (the consideration paid) was not reasonably equivalent – in other words, the recipient received the assets at less than fair market value; and 7) the debtor was insolvent or became insolvent soon after the transfer.

[20] See 11 U.S.C. § 548 (a)(1)(A). For a discussion of fraudulent transfers in Ponzi schemes, see Kathy Bazoian Phelps and the Hon. Steven Rhodes (Ret.), *Receivers' Fraudulent Transfer Claims in Ponzi Scheme Cases*, California Receiver Forum, Loyola Forum V (January 18-19, 2013), and available at www.theponzibook.com/Loyola_V_Materials.pdf

[21] 11 U.S.C. § 548 (a)(1)((B).

[22] 11 U.S.C. § 548(c) creates a "good faith" defense. The UFTA provides for a similar defense. For a good summary of fraudulent transfer law, see Edward S. Weisfelner, *Advanced Fraudulent Transfers* (American Bankruptcy Institute 2014).

[23] 11 U.S.C. § 544(b). This part of the code provides that a trustee may avoid a transfer "that is voidable under applicable law by a creditor holding an unsecured claim." In other words, a trustee may rely on non-bankruptcy law (i.e., state law) so long as there is at least one non-secured creditor with a stake in the outcome.

[24] Some states have adopted a six-year "look back" period (i.e., New York and Michigan) or a five-year period (i.e., Iowa). A four-year period is the most common.

[25] *In Re Over*, case no. #94-10184-WWB (W. Dist. Pa.). The case began as a Chapter 11 proceeding and was converted to Chapter 7 in 1995.

[26] *Pittsburgh Post-Gazette*, "Farmer used cows to milk his creditors, feds charge" (November 11, 2002), available at http://old.post-gazette.com/localnews/20021111cowfraudreg5p5.asp.

[27] Over received his bankruptcy discharge on October 13, 1996.

[28] *U.S. v. Vern E. Over*, 2:01-cr-00120-GLL-1.

[29] *Pittsburgh Post-Gazette*, "Farmer used cows to milk his creditors, feds charge" (November 11, 2002), available at http://old.post-gazette.com/localnews/20021111cowfraudreg5p5.asp.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *TribLIVE*, "Dairy farmer jailed for bankruptcy fraud" (January 7, 2003), available at https://archive.triblive.com/news/dairy-farmer-jailed-for-bankruptcy-fraud.